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In the Supreme Court of the United States

CHARLES C. CURRIER, as personal representative of the Estate of Anthony Michael Juarez, deceased; and DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,
Cross-Petitioners,

v.

TOM DORAN, SHIRLEY MEDINA, and MELBA GONZALES,
Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a social worker who violates children's right to substantive due process by recklessly and shockingly placing the children "at obvious risk of serious, immediate, and proximate harm" — and who, in the process, does "precisely" what "similar cases in other circuits" have already held unconstitutional — nevertheless qualifies for qualified immunity on the ground that Plaintiffs' "particular theory of danger creation" has never previously been the subject of a published appellate opinion.

LIST OF PARTIES

Cross-Petitioners

Charles C. Currier, as personal representative of the Estate of Anthony Michael Juarez, deceased

Devonne Esperanza Juarez, as mother and next friend of Latasha Juarez, a minor

Cross-Respondents

Tom Doran
Shirley Medina
Melba Gonzales

Other Parties to the Proceeding in the Tenth Circuit

All parties listed above were likewise parties to the Tenth Circuit appeal. Defendant-Appellant Regina Sentell was an additional party to the appeal. Defendant Kelly Robbins did not participate in the appeal but remains a party in the district court. The United States of America participated in the Tenth Circuit appeal as an amicus curiae in support of Defendants' petition for rehearing.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Charles C. Currier and Devonne Esperanza Juarez ("Plaintiffs") respectfully file this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported as *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), and is reproduced in the Appendix to the Petition for a Writ of Certiorari (No. 01-382) at pages App. 1-43. The relevant opinions and orders of the district court include an opinion and order dated October 21, 1998, which is reported as *Currier v. Doran*, 23 F. Supp. 2d 1277 (D.N.M. 1998) (App. 57-71); an unreported order dated November 25, 1998, which vacated the October 1998 opinion in part (App. 72-74); and an unreported opinion and order dated August 19, 1999 (App. 44-56).

JURISDICTION

The court of appeals entered its judgment on March 1, 2001. App. 1. On June 1, 2001, the court denied Plaintiffs' timely petition for rehearing (as well as a separate petition for rehearing filed by Defendants-Appellants). App. 80-81. Cross-Respondents Tom Doran and Melba Gonzales filed a Petition for a Writ of Certiorari (No. 01-382), which was docketed in this Court on August 30, 2001. Doran and Gonzales invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). Plaintiffs file the present conditional cross-petition under the authority of Supreme Court Rule 12.5.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV, § 1.

Section 1983 of Title 42 of the United States Code provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...." 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This action arises under the provisions of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983. Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343. They alleged that Defendants — state social workers and social work supervisors — had violated the substantive due process rights of Anthony and Latasha Juarez by placing and leaving these young children with an alternately neglectful and abusive father who repeatedly beat both of them and eventually scalded Anthony to death.

At issue in the present Cross-Petition is a single but important aspect of Plaintiffs' claims — the allegation that on several occasions ending in January 1994, while the children were indisputably in the physical and legal custody of their

father, Defendants/Cross-Respondents "render[ed] [the children] more vulnerable" to a known risk of violence at their father's hands, *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989), by discouraging the children's mother from continuing to report telltale signs of abuse to the appropriate authorities. The district court, ruling on motions to dismiss, decided that this allegation (among others) described a violation of the children's clearly established constitutional rights. App. 47-49, 51-53. The court of appeals agreed that by directing the children's mother to keep quiet about the evidence of abuse, Defendants "could have put Anthony and Latasha at obvious risk of serious, immediate, and proximate harm, a harm that [Defendants] recklessly and consciously disregarded" in a "conscience shocking" way. *Id.* 36. The court of appeals also observed that this behavior had "precisely" mirrored conduct that "similar [prior] cases in other circuits" had condemned as unconstitutional. *Id.* 34-35. But the court of appeals held that Defendants were nevertheless entitled to qualified immunity, because "[a] reasonable official in [Defendants'] position would not have understood that her conduct created a claim under the danger creation theory." *Id.* 42.

The court of appeals' opinion summarizes the facts of the case, only a few of which need be considered for purposes of the present Cross-Petition. The Children, Youth and Families Department of the State of New Mexico ("CYF") removed Latasha and Anthony Juarez from the home of their natural mother in April 1993, in response to findings of child neglect. App. 4. On May 10, 1993, following a custody hearing in children's court, Latasha and Anthony were delivered to the physical custody of their natural father, Christopher Vargas ("Vargas") — because, Plaintiffs allege, one or more of the Defendant social workers failed to inform the court about several worrisome circumstances. *Id.* 5.

Vargas subsequently obtained legal as well as physical custody of the children, either in June 1993 or in October 1993. *Id.* The date by which the children left the state's legal custody is a subject of dispute between the parties, but that dispute is immaterial to the present Cross-Petition.

On several occasions between July and October 1993, Defendant Tom Doran observed bruising on the children and heard allegations that Vargas was abusing them. *Id.* 5-6. When new bruises appeared in November 1993, CYF took the children into emergency custody. *Id.* 6. The ensuing investigation — which prompted Vargas to admit that he had bitten Anthony — persuaded Doran that the children would be subject to further injury in Vargas's home, and Doran prepared an affidavit to that effect. But Doran ultimately agreed with his supervisors, including Defendant Melba Gonzales, that the children should be returned to Vargas. *Id.* 6-7.

In January 1994, Defendant Shirley Medina investigated additional bruises on Anthony's buttocks. She concluded that they had resulted from a fall. *Id.* 7. At this same time, however, the children's court-appointed special advocate filed a report stating that CYF — specifically Defendant Doran — "feels that Anthony and Latasha will be subject to further injury in their current home situation." 10th Cir. Aplt. App. at 263, 265. The special advocate recommended "continue[d] ... periodic[] monitor[ing]" of the situation. *Id.* at 266.

But Defendants took precisely the opposite tack. On January 19, 1994, Defendants Doran and Medina met with the children's mother — Cross-Petitioner Devonne Juarez — to inform her of their conclusion that the most recent allegations of physical abuse had failed to pan out. Devonne asserted that

Vargas "had left bruises on Anthony before." 10th Cir. Aplt. App. at 153k. Despite Doran's belief that the children "would be subject to further injury" in Vargas's home, Medina and Doran admonished Devonne that "these allegations [had] to stop because it was only traumatizing the children evertime [sic] we investigate them." *Id.*

This episode was the culmination of weeks of official belittlement of Devonne's concerns dating back to at least November 1993, when, in response to Devonne's report that Vargas had bitten Anthony, Defendant Gonzales had "told [her] to stop lying and stop being a 'bitch.'" *Id.* at 168-69. Gonzales and Doran, in particular, had repeatedly accused her of making, and coaching her children to make, false allegations against Vargas. *Id.* at 168-70. As a consequence of these recriminations, Devonne became discouraged from continuing to voice her suspicions that the children were being beaten, at a time when their bruises were appearing with increasing frequency. *Id.* Three months later, in April 1994, Vargas poured boiling water on Anthony, who died in intensive care a few weeks afterwards. CYF soon discovered that Latasha, too, was covered with bruises.

"After an examination of similar cases in other circuits," the court of appeals concluded that Plaintiffs had indeed "alleged a constitutional violation by Medina in her instruction to [Devonne] to stop making allegations of abuse." App. 34.[1] The "similar cases in other circuits" had all been

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[1] The court did not explicitly consider the same claim against Defendants Doran and Gonzales, because it held that those Defendants had endangered the children in other ways months beforehand. App. 28-31, 36-40, 42-43. If that holding was in error — as Defendants argue in their Petition for a Writ of

decided before Medina spoke her discouraging words to Devonne in January 1994. They included *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), in which the court decided that the defendant policemen had unconstitutionally enhanced a preexisting danger for flag-burning demonstrators by advising a group of "skinheads" that the police would not prevent them from assaulting the demonstrators; *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), in which the court determined that a police chief could be held liable under the civil rights laws for a woman's murder because he had previously instructed his officers not to respond to the victim's complaints against the killer — "an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community," *id.* at 54; and *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), in which the court "allow[ed] recovery under the Constitution for injury resulting from state prevention of [a] private rescue attempt." App. 34-35. "[T]hese cases," the court of appeals observed, "illustrate that the state can be liable when it affirmatively places private citizens in harm's way by removing what would otherwise be safety valves." *Id.* 35.

Addressing a potential distinction between Tenth Circuit precedent and the present case, the court of appeals continued:

> That the potential aid Medina's conduct tended to foreclose was from a state source rather than a private source is not

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Certiorari — the outcome of the present Cross-Petition will determine the liability not only of Medina, but of Doran and Gonzales as well.

> constitutionally significant. The Eighth Circuit stated in *Freeman* [in 1990] that a state actor cannot "interfere with the protective services which would have otherwise been available in the community." *This is precisely what Medina did when she instructed Juarez to stop making allegations of abuse.*

App. 35 (citation omitted; emphasis added). The court of appeals concluded:

> Medina increased the children's vulnerability to Vargas, the first requirement of a danger creation cause of action. Medina's conduct could have put Anthony and Latasha at obvious risk of serious, immediate, and proximate harm, a harm that Medina recklessly and consciously disregarded. Medina's conduct could be conscience shocking, depending on further context as provided by discovery. Thus, assuming Plaintiffs will be able to prove that Medina's conduct was a cause of the harm to the children, Plaintiffs have alleged a danger creation constitutional claim against Medina.

Id. 36 (citation omitted).

The court of appeals then turned to the question whether the relevant law was clearly established in January 1994. Citing this Court's 1989 *DeShaney* decision, the Tenth Circuit's opinion in *Medina v. City of Denver*, 960 F.2d 1493 (10th Cir. 1992), and "the ample case law from other circuits," the court of appeals held that "a reasonable state official would have known in 1993 and 1994 that reckless,

conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm was unconstitutional." App. 40. In other words, "the danger creation cause of action was clearly established at the time of the events underlying this suit." *Id.* 41.

Even so, the court of appeals ruled that Medina was entitled to qualified immunity — because "[t]he particular theory of danger creation on which Plaintiffs have stated a claim against Medina ... is substantially less established in the case law." App. 41. Plaintiffs' "particular theory of danger creation," according to the court of appeals, was that "a government official, by her statements discouraging [a] citizen[] from seeking protection from government officials for harm inflicted by [an]other private citizen[], ... created [a] danger of private abuse." *Id.* Without any Tenth Circuit precedents directly on point,

> [t]he closest support for this particular[] application of the danger creation theory comes from two cases decided by other circuits. *See Dwares*, 985 F.2d at 94 (decided by the Second Circuit in 1993); *Freeman*, 911 F.2d at 52 (decided by the Eighth Circuit in 1990). These two cases, however, involve circumstances which are not sufficiently analogous to those surrounding Medina's involvement in this case to constitute clearly established law. In *Dwares*, the police officers directly told the citizens committing the violence that they would not interfere with the citizens' assault on other private citizens; Medina made no such statement to Vargas or his fiancee. In *Freeman*, the police chief

> directed officers not to respond to a citizen's complaint; Medina made no such statement to her co-workers or to any other government entity which might have responded to Juarez's requests for help.

App. 41-42 (citation omitted). Thus, the court of appeals decided, "[a] reasonable official in Medina's position would not have understood that her conduct created a claim under the danger creation theory." *Id.* 42.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Decided a "Danger Creation" Case, and the Federal Appellate Courts Have Articulated Divergent Standards for Assessing Claims of Qualified Immunity in Such Cases.

"As a general matter," as this Court has made clear, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. Thus, the Court held in *DeShaney* that state social workers had no constitutional duty to rescue a young child from his abusive father. In reaching this result, the Court emphasized that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" *Id.* at 201 (emphasis added); *see also, e.g.*, *id.* at 197 ("[P]etitioners concede the State played no part in creating [the danger] ...."). The state escaped liability because "it placed [Joshua] in no worse position than that in which he would have been had it not acted at all." *Id.* at 201. The plain implication of these passages was that the outcome

would have been quite different if the state had knowingly or recklessly contributed to Joshua's peril.

Lower courts were quick to accept the suggestion, *see, e.g.*, *Wood v. Ostrander*, 879 F.2d 583, 589-90, 596 (9th Cir. 1989); *Ross v. United States*, 910 F.2d 1422, 1431-33 (7th Cir. 1990); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); and by early this year, "[a]ll circuit courts of appeals ... ha[d] ... relied on th[ese] passage[s] in *DeShaney* to acknowledge that there may be possible constitutional liability under § 1983 'where the state creates a dangerous situation or renders citizens more vulnerable to danger,'" *Butera v. District of Columbia*, 235 F.3d 637, 648-49 (D.C. Cir. 2001) (quoting *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993)); *see id.* at 649 n.10 (collecting cases); *see also id.* at 651 (joining the crowd). In the dozen years since *DeShaney* was decided, "[t]he circuit courts have adopted the State endangerment concept in a range of fact patterns concerning alleged misconduct by State officials." *Id.* at 649-50. Even without any explicit guidance from this Court, the "danger creation" doctrine has become a fixture of due process jurisprudence.

But despite the consensus of circuit court opinion that government officials can be held constitutionally accountable for subjecting citizens to special dangers, there is little agreement about how the courts should evaluate assertions of qualified immunity from such liability. In *Butera v. District of Columbia*, for example, the court embraced the theory of danger creation but awarded the defendants qualified immunity with respect to it — in part because "to date no circuit has applied the State endangerment concept where an arguably voluntary informant, much less a police operative like [plaintiff's decedent], was involved." 235 F.3d at 654. By contrast, in *Monfils v. Taylor*, 165 F.3d 511 (7th Cir.

1998), the court attached no apparent significance to the unfortunate victim's status as an "arguably voluntary informant," *Butera*, 235 F.3d at 654 — and made little effort to liken the facts of the case at hand to those of previous cases — but instead found it sufficient to observe that the defendant detective's failure to safeguard an audiotape of the informant's phone call had "created a danger [the informant] would not otherwise have faced," at a time when the danger-creation doctrine itself was "clearly established" in the Seventh Circuit. *Monfils*, 165 F.3d at 518; *accord, e.g.*, *McClendon v. City of Columbia*, 258 F.3d 432, 443 (5th Cir. 2001) ("[A]s ... it was clearly established [in July 1993] that [state-created] danger could lead to liability under § 1983, we cannot say, viewing the evidence in the light most favorable to [the plaintiff], that [the defendant's] actions were objectively reasonable."); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) ("[A]t the time of the events at issue ..., the law was clearly established that [police] officers may be liable where they affirmatively place an individual in danger."); *Ross v. United States*, 910 F.2d at 1432-33 (affirmatively answering the question "whether it was clearly established on August 11, 1985, that a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative," because "[it] has always been a fundamental tenet of our constitutional jurisprudence, even before ... *DeShaney*[, that] the state cannot arbitrarily assert its power so as to cut short a person's life").

As a result of the decision below, Tenth Circuit case law itself is now split along these same lines. Consider *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998), in which the plaintiffs sought to hold various public school officials responsible for the December 1994 death of their son, who had committed suicide in his parents'

bedroom after being suspended from school and driven home by a counselor on the principal's instructions. *Id.* at 1256-57. In analyzing the defendants' claim of qualified immunity, the court did not ask, for example, whether any court had previously held state officials constitutionally liable for the injurious consequences of delivering a child to his own home — or, more generally, for a suicide accomplished in a noncustodial setting. Apparently, no court ever had. It made no difference. Because the defendants had recklessly augmented the special danger of self-destruction that the plaintiffs' decedent faced, and because the cited cases demonstrated that "danger creation jurisprudence was clearly established as a matter of law at the time," the court rejected the defense of qualified immunity. *See id.* at 1262.

The same reasoning dictated the denial of qualified immunity in *Sutton v. Utah State School for Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999). The court did not ask, for example, whether previous cases had characterized an official's momentary inattention as an "affirmative act" of endangerment against which her supervisor had a constitutional duty to implement a policy. *See id.* at 1239. Instead, the court was content to observe that the danger-creation doctrine was clearly established at the time of the acts in question. *See id.* at 1241.

The opinion of the court of appeals in this case is not only incompatible with the Tenth Circuit's prior pronouncements on qualified immunity in danger-creation cases; it is also at war with itself. The court denied qualified immunity to Defendant Doran because "a reasonable state official would have known in 1993 and 1994 that reckless, conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm was unconstitutional." App. 40. The court

did not attempt — nor, in Cross-Petitioners' view, should it have attempted — to identify pre-1993 precedents imposing constitutional liability on social workers who had recklessly transferred custody of their charges to irresponsible natural parents, or who had permitted such parents to inflict abuse upon children residing in the legal custody of the state. *Id.* 38-41. Yet it awarded qualified immunity to Defendant Medina on the ground that preexisting case law had not clearly established "[t]he particular theory of danger creation" applicable to her conduct. *Id.* 41-42. These two adjacent portions of the opinion simply cannot be reconciled. In short, the opinion below is a microcosm of the case law, emblematic of a larger confusion.

The question posed by these competing strands of doctrine is important, however the Court chooses to resolve it. Government is omnipresent in America, and danger-creation jurisprudence has now taken root in every federal circuit. Particularly when "reckless, conscience shocking [government] conduct that alter[s] the status quo and place[s] a [citizen] at substantial risk of serious, immediate, and proximate harm" is at issue, App. 40, the elements of qualified immunity should not appear to vary from court to court or from case to case, much less from one section of an opinion to the next. Respect for the law — and for the state whose agents stand accused of complicity in private violence — depends on the existence of coherent standards of liability, consistently applied.

II. The Decision of the Court of Appeals Is Erroneous.

A government official who violates a plaintiff's constitutional right enjoys qualified immunity from suit unless, at the time he acts, the right is clearly established.

"The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). But "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* "There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances." *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.).

Here, after determining that Defendant Medina had recklessly placed the children "at obvious risk of serious, immediate, and proximate harm" by increasing their vulnerability to their father in a conscience-shocking manner, App. 36, the court of appeals also concluded — altogether correctly — that "the danger creation cause of action was clearly established at the time." *Id.* 41; *see id.* 38-40. Indeed, the court of appeals went further, by demonstrating that Medina had done "precisely" what "similar cases in other circuits" had already held unconstitutional, *id.* 34-35: she had "interfere[d] with the protective services which would have otherwise been available in the community." *Id.* 35 (quoting *Freeman v. Ferguson*, 911 F.2d at 54).

But the court of appeals dug a "level of [specificity]" deeper still, *Anderson v. Creighton*, 483 U.S. at 639, and it was at this level that the court perceived a lack of congruity between Medina's actions and the contemporaneous case law. Whereas prior circuit cases had validated civil rights lawsuits against government officials who had "directed [their subordinates] not to respond to a citizen's complaint," App. 42, no circuit case had involved a situation in which officials

had stifled such complaints in the first instance.[2] In earlier cases, police officers had fomented third-party violence by agreeing not to interfere with it, *id.*, but not by demanding such inertia from private actors. Thus, although Medina had "precisely" mimicked the conduct declared unconstitutional in previous circuit cases, *id.* 35, those cases had not foreshadowed the present case quite precisely enough. Although Medina had transgressed the "fundamental [constitutional] tenet" that the state cannot recklessly endanger its citizens, *Ross v. United States*, 910 F.2d at 1433, she could escape liability because Plaintiffs' "particular theory of danger creation" had never previously been the subject of a published appellate opinion, App. 41-42.

The court of appeals' opinion establishes a standard

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[2] In fact, at least one prior case had found such a scenario unconstitutional; and the case was so notorious that Defendants in the present case may have actually (rather than just constructively) heard of it. *See Estate of Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1346, 1349 (E.D. Wis. 1992) (city increased vulnerability of Jeffrey Dahmer victim by, among other things, "threaten[ing] to arrest [private citizens] if they persisted in trying to help [the victim] or to provide information"). Presumably the court of appeals discounted *Sinthasomphone* as a potential source of "clearly established" law because it was decided by a district court. *But see Clanton v. Cooper*, 129 F.3d 1147, 1156 (10th Cir. 1997) ("Ordinarily, ... a plaintiff must establish that there is a Supreme Court or Tenth Circuit opinion on point, or that the clearly established weight of authority from other courts has held the law to be as the plaintiff maintains. *This test is not rigid, however.*" (citation omitted; emphasis added)); *cf. Wilson v. Layne*, 526 U.S. 603, 616 (1999) (considering two unpublished district-court opinions and another opinion from an intermediate state appellate court).

for the vindication of constitutional rights that is either impossibly rigorous or intolerably ad hoc. Defendant Medina, as the court itself declared, did "precisely" what "similar cases in other circuits" had earlier found violative of substantive due process. App. 34-35. What more must Plaintiffs show? To immunize public officials whose misdeeds fail to conform to a "particular theory of danger creation," *id.* 41, is to promote pettifoggery, not to protect conscientious efforts to comply with the Constitution.

Insistence on déjà vu as the touchstone of constitutional liability is especially misguided in "danger creation" cases. At least in the Tenth Circuit, the question whether the law was clearly established does not even arise, *see Siegert v. Gilley*, 500 U.S. 226 (1991), until the plaintiff has first demonstrated that

> (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

App. 25. A public official who recklessly and shockingly jeopardizes particular individuals by exposing them to a substantial and obvious risk of "serious, immediate, and proximate harm" cannot colorably contend that his actions were characterized by "objective legal reasonableness." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Having

found a violation of constitutional rights on the strength of this formidable six-part test, a court cannot logically go on to hold "as a matter of law" that the defendant "could reasonably have ... thought [his conduct] consistent" with those rights. *Anderson v. Creighton*, 483 U.S. at 638, 641.

Defendants in the present case imperiled the very children they were sworn to protect, by deliberately deterring the children's mother from continuing to speak out about evidence of physical abuse — and "the information [Defendants] had when th[is] conduct occurred," *Saucier v. Katz*, 121 S. Ct. 2151, 2159 (2001), was their own well-founded belief that the children "would be subject to further abuse if permitted to stay with Vargas," App. 6-7. The court of appeals ruled that Defendants were entitled to qualified immunity, not because the line between affirmative endangerment and simple inaction is "hazy," *Saucier*, 121 S. Ct. at 2158, and not because Defendants were led astray by any formal policies of their department, *see Wilson v. Layne*, 526 U.S. 603, 617 (1999), but only because "[t]he particular theory of danger creation" implicated by these facts "is substantially less established in the case law" than other "particular theories" one might identify, App. 41. Had the court of appeals more carefully attended to the principles of qualified immunity, it would have held Defendant Medina liable on the basis of its determination that "the danger creation cause of action was clearly established at the time of the events underlying this suit." *Id.* The facts of the earlier cases are "not distinguishable in a fair way from the facts presented in the case at hand," *Saucier*, 121 S. Ct. at 2157, merely because Defendants in this case picked a different poison.

CONCLUSION

If Defendants' Petition for a Writ of Certiorari is granted, this conditional Cross-Petition should likewise be granted.

Respectfully submitted,

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